No. 87-771 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT AMERICAN PUBLIC POWER ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the District of Columbia Circuit *en banc* majority err in holding that a final administrative order cannot preclude relitigation of the same issue between the same parties?

2. Does preclusion doctrine retain any value if, as the District of Columbia Circuit *en banc* majority held, a tribunal may *sua sponte* ignore a decision on the same issue and between the same parties when it believes that the decision was in error?

3. Did the District of Columbia Circuit *en banc* majority err in holding that an administrative declaratory order cannot, as required by 5 U.S.C. § 554(e), actually "terminate a controversy" or "remove uncertainty"?

PARTIES TO THE PROCEEDINGS BELOW

Respondent American Public Power Association is a national service organization composed of more than 1,750 municipal and state-owned electric utilities in 49 states. It was an intervenor in the proceedings before both the Courts of Appeals and the Federal Energy Regulatory Commission in this matter. Its members include municipalities, state power authorities and districts, and other publicly owned utilities that generate, transmit, and distribute electricity. A list of the parties in the Court of Appeals appears at p. ii of the Petition for a Writ of *Certiorari* filed by the Clark-Cowlitz Joint Operating Agency.

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REASONS FOR GRANTING THE WRIT

On occasion, cases arise whose specific outcome is of no great moment to nonparties, but which provide the vehicle for a holding that touches the fundamentals of the American judicial system *(e.g., Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938)).

This Court has repeatedly recognized that application of preclusion doctrines "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions," *Montana v. United States,* 440 U.S. 147, 153 (1979), and "essential to the maintenance of social order," *Nevada v. United States,* 463 U.S. 110, 129 (1983). Preclusion "is a rule of fundamental and substantial

justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981).

This case concerns whether preclusion attached to the decision of the Federal Energy Regulatory Commission (the "Commission") in *City of Bountiful*, 11 F.E.R.C. (CCH) ¶ 61,337 (Opinion No. 88), *reh'g denied*, 12 F.E.R.C. (CCH) ¶ 61,179 (1980) (Opinion No. 88-A), *aff'd sub nom. Alabama Power Company v. Federal Energy Regulatory Commission*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied*, 463 U.S. 1230 (1983) (hereinafter "*Bountiful*"), so as to prohibit the Commission from taking a contrary position in the proceedings on the Merwin hydroelectric project in *Pacific Power & Light Company*, 25 F.E.R.C. (CCH) ¶ 61,052 (Opinion No. 191), *reh'g denied*, 25 F.E.R.C. (CCH) ¶ 61,290 (1983), *aff'd sub nom. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074 (D.C. Cir. 1987) (en banc) (hereinafter "*Merwin*").

In the instant case, the *en banc* majority reviewing *Merwin* ruled that the Commission's declaratory order in *Bountiful* did not preclude the agency from subsequently reconsidering (and overruling) the same purely legal issue between the same parties despite the absence of any changed factual circumstances. In doing so, the *en banc* majority emasculated the requirements of preclusion in administrative proceedings, established principles that would allow any tribunal entitled to deference on review to ignore preclusion, and effectively nullified the provision of the Administrative Procedure Act, 5 U.S.C. § 554(e), that permits an agency to issue declaratory orders "to terminate a controversy or remove uncertainty." [1]

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[1] The extent to which the *en banc* majority chose to ignore this Court's decisions on preclusion is shown by its statement that "[i]t is well settled that the determination of an issue of law should not be accorded preclusive effect if such effect would result in 'inequitable administration of the law.'" *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (en banc). It is hard to imagine a position more diametrically opposed to the decision and rationale of *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981):

> The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a

(footnote continues)

The most striking example of the destruction of fundamental principles of law by the *en banc* decision can best be illustrated hypothetically. Under the rationale of the *en banc* majority reviewing *Merwin,* review by any court of an agency's interpretation of a statute is limited to the reasonableness of that interpretation, and the decision is merely dicta with respect to contrary interpretations. Therefore, even if this Court had earlier granted *certiorari* in *Bountiful* and unanimously determined that the statutory construction reached by the Commission in *Bountiful* was the *only* reasonable interpretation, this Court's hypothetical decision—to the extent it was such "dicta"—would not have precluded the Commission from adopting a contrary interpretation in subsequent litigation between parties to the original *Bountiful* decision.[2] Certainly, neither the Solicitor General nor any party seeking or opposing the grant of a writ of *certiorari* in *Bountiful* made any such suggestion.[3] Indeed the Solicitor General, on behalf of the Commission, informed this Court in *Bountiful* "that virtually all of the investor-owned utilities that own and operate federally licensed hydroelectric facilities were parties to the case." Therefore, he wrote, "[u]nder traditional *res judicata* principles if this Court denies certiorari and the court of appeals' judgment affirming the Commission's declaratory order be-

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(footnote continued)

> particular case. *There is simply no principle in law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.*

Moitie at 401 (emphasis added).

[2] While we are aware of the danger of attempting to discern the thinking of Justices White and Blackmun, who voted to grant *certiorari* to the Eleventh Circuit in *Bountiful,* we do not regard as likely the possibility that they, or indeed any Justice, thought that this Court was being asked to render an essentially advisory opinion, which the Commission would then be free to disregard in subsequent proceedings between the parties.

[3] The brief for the Commission filed by the Solicitor General stated that the issue was the definitive and binding determination of the meaning of the statute:

> The question presented is whether the statute requires the Commission in a license renewal proceeding, to give a state or municipal applicant a preference over the original licensee's renewal application.

(footnote continues)

comes final, these entities may be bound by the Commission's order in any future relicensing proceeding." [4] S.G. Brief at 7-8.

(footnote continued)

Brief of the Federal Energy Regulatory Commission at I, *Utah Power & Light Co. v. Federal Energy Regulatory Commission*, 463 U.S. 1230 (1983) (No. 82-132) (hereinafter "S.G. Brief").

That was the precise issue answered in the affirmative by the Court of Appeals for the Eleventh Circuit reviewing *Bountiful*. Yet, the current position of both the Commission and the *en banc* majority is that the Commission was not required—even when confronted by the parties to the *Bountiful* litigation—to recognize the existence of such a preference.

[4] Thus, the Solicitor General asserted that there was "a serious question" as to whether the issue of statutory interpretation "can be subjected to further judicial scrutiny in a subsequent case." S.G. Brief at 8. There was certainly no suggestion that any party to *Bountiful* would not be precluded in the relicensing proceedings.

The Solicitor General's concern that the traditional rules of preclusion would bind the entire industry and therefore prevent the Commission from ever revisiting its *Bountiful* determination has now become theoretical with the enactment of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495 (1986), 100 Stat. 1243 (1986), and need not be addressed by this Court.

Furthermore, the tribunal on other occasions will have ample opportunity to deal with this potential problem. For example, a future Commission could decline to grant intervenor status to the entire industry and instead limit it to the party or parties initially seeking the declaratory order while permitting other interested entities to participate as amicus. Thus, the tribunal can at the outset ensure that preclusion will operate only as to a limited number of parties, allowing itself the ability in subsequent proceedings to deal with others under the less stringent requirements of *stare decisis*. In *Bountiful*, however, the Commission permitted intervention and made clear that it intended its determination to apply to all pending cases:

> There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change depending on the factual setting.

FERC Brief to the Eleventh Circuit, J.A. at 56 n.4, *reprinted in* Clark-Cowlitz Joint Operating Agency's Petition for Writ of *Certiorari* at 8. Even if somehow preclusion were not mandated for all parties to *Bountiful*, at a minimum preclusion clearly barred relitigation among the contestants in the small number of then-ongoing relicensing proceedings who participated in *Bountiful* specifically to obtain a conclusive interpretation which would govern their proceedings. Others who chose to participate as parties rather than seeking amicus status deliberately did so in order to obtain the benefits of a preclusive determination.

A. THE *EN BANC* MAJORITY'S FAILURE TO RECOGNIZE THE PRECLUSIVE EFFECT OF THE COMMISSION'S *BOUNTIFUL* ORDER DISREGARDS FUNDAMENTAL REQUIREMENTS OF PRECLUSION AND LEAVES THE VAST MAJORITY OF ADMINISTRATIVE DECISIONS OPEN TO RELITIGATION IN PROCEEDINGS BETWEEN PARTIES TO THE ORIGINAL DETERMINATION.

The majority of the *en banc* court reviewing *Merwin* correctly recognized the basic principles of preclusion:

> The principle underlying the rule of claim preclusion is that a party who *once has had a chance* to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle—that one who has *actually litigated an issue* should not be allowed to relitigate it—underlies the rule of issue preclusion.

Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (en banc) (affirming *Merwin*). However, the *en banc* majority then proceeded to misapply these principles by focusing solely on the decision of the Eleventh Circuit in *Alabama Power Company v. Federal Energy Regulatory Commission,* 685 F.2d 1311 (11th Cir. 1982) (affirming *Bountiful*), *cert. denied,* 463 U.S. 1230 (1983), while completely ignoring the fact that the Commission's original decision itself precludes relitigation. The Commission determined in *Bountiful* that the Federal Power Act, 16 U.S.C. § 800(a)(1982), required application of the public preference in all relicensing proceedings. If that order had become final without appeal, it would have had substantive preclusive effect on the parties. The affirmance by the Eleventh Circuit did not convert the Commission's initial order from a determination on the merits into a determination based merely on deference. There is no basis in logic or law for the proposition that an appeal that results in a unanimous affir-

mance in any way detracts from the preclusive effect of an agency's original decision.[5]

Ignoring the necessarily preclusive effect of the Commission's *Bountiful* decision, the majority of the *en banc* court reviewing *Merwin* held that the Eleventh Circuit had determined only that the Commission's *Bountiful* interpretation was reasonable, and therefore that the Eleventh Circuit could not have determined the reasonableness of the contrary statutory interpretation which was not before it.[6] The *en banc* majority's myopic focus on the Eleventh Circuit's limited standard of review points logically to the absurd conclusion that even if this Court had also affirmed *Bountiful*, based on the same standard of review, that decision could not, as a matter of law, have precluded the Commission from flip-flopping and declining to apply the *Bountiful* determination to proceedings involving the *Bountiful* parties.[7]

Indisputably, the Commission in *Bountiful* did determine which of the two interpretations was correct. The Commission's decision was intended, in the words of the Administrative Procedure Act, 5 U.S.C. § 554(e), "to terminate a controversy" and "to remove uncertainty." The parties all regarded it as doing so. The Eleventh Circuit's affirmance of *Bountiful* and this Court's denial of the petitions for *certiorari* made the

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[5] If the *en banc* decision is allowed to stand, it raises the spectre that some counsel will seek review of agency decisions when they anticipate a change of the Executive Branch (and therefore of the composition of a Commission) for the sole purpose of reducing a preclusive decision on the merits into an ignorable decision based on deference. But this flies in the face of the basic purpose of preclusion, which is to prohibit such relitigation both for the benefit of the parties and to prevent needless impositions on a strained judicial system.

[6] The *en banc* majority acknowledged the Eleventh Circuit's view that the interpretation later adopted by the Commission in *Merwin* "would lead to absurd results," *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*, 826 F.2d 1074, 1079 n.4 (D.C. Cir. 1987) (en banc), but characterized that view as "dicta" since the "reviewing court . . . had only to determine the reasonableness of FERC's prior interpretation, not the correctness of competing interpretations." *Id.*

[7] This situation would apply to the vast majority of agency decisions because the standard for reviewing their decisions is generally deferrential under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or the substantial evidence rule.

Commission's decision final and precluded relitigation between the parties on the issue decided in *Bountiful.* [8]

B. THE *EN BANC* MAJORITY'S HOLDING THAT PRECLUSION ONLY PREVENTS THE LOSING PARTIES TO THE FIRST DECISION FROM REARGUING ISSUES WHICH THEY HAD LOST, BUT DOES NOT PREVENT THE TRIBUNAL FROM REEXAMINING THE FIRST DECISION, RENDERS ILLUSORY AND VALUELESS THE REPOSE THAT PRECLUSION PRINCIPLES ARE INTENDED TO BESTOW ON THE PARTIES TO THE FIRST DETERMINATION.

The majority of the *en banc* court reviewing *Merwin* has trivialized preclusion doctrine by holding that preclusion binds only adverse parties and not the tribunal before which they appear. The *en banc* majority stated that:

> The doctrine of preclusion is meant to prevent parties from rearguing issues they have already lost. But Pacific Power has never argued that *Bountiful* did not apply to it. It was the *decisionmaker,* FERC, that changed its position.

Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1080 n.5 (D.C. Cir. 1987) (en banc) (affirming *Merwin*) (emphasis in original). Thus, according to the *en banc* majority, the tribunal is always free to change its position as to certain parties even when those parties are before it but are themselves precluded from urging such a change. If this is the law, the salutary benefits of preclusion so

[8] The treatment of preclusion by the *en banc* majority reviewing *Merwin* would be equivalent to saying that there is no preclusion among the parties following a jury verdict of negligence and an affirmance by a court of appeals determining that the evidence was sufficient to go to a jury. Under the *en banc* court's rationale, there would be no preclusion because the court of appeals did not decide the mirror-image issue of whether a verdict of "no negligence" was legally permissible. Applying this reasoning in an overwhelming number of cases arising either in an agency or a district court, review by a court of appeals would deny preclusion to the initial determination of the agency or court.

often emphasized by this Court are illusory indeed.[9] Any tribunal determined to change its own decision could do precisely what the Commission did in *Merwin*—reaching an opposite result and not giving preclusive effect to a prior decision on the same legal issue between the same parties. But the basic purpose of preclusion is to settle the issue between the parties. Indeed, as the Court has emphasized, preclusion is fully applicable where the first decision was wrong. *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981). It is simply inconceivable that the decision of this Court in *Moitie* turned on whether the tribunal acted *sua sponte* rather than in response to the urging of the party that had previously lost.

C. THE DECISION OF THE *EN BANC* MAJORITY REVIEWING *MERWIN* NULLIFIES THE BENEFICIAL PURPOSE OF THE DECLARATORY ORDER SECTION OF THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act, 5 U.S.C. § 554(e), provides that:

> The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

The Commission, in issuing its *Bountiful* declaratory order, did all that was within its power to "terminate a controversy" and "remove uncertainty." However, under the holding of the *en banc* majority in *Merwin,* it is beyond an agency's power ever to issue a declaratory order that must be binding on the parties to it, because the application of that order will necessitate a separate proceeding in which the declaratory order will be subject to collateral attack.

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[9] *See, e.g., Nevada v. United States,* 463 U.S. 110 (1983); *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981); *Montana v. United States,* 440 U.S. 147 (1979).

The *en banc* majority concedes that the Commission's order in *Bountiful* is final and thus immune from direct attack. It then treats *Merwin* as a collateral proceeding, holding that both the claim and issue in *Merwin* are somehow different from those in *Bountiful. Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission,* 826 F.2d 1074, 1079 (D.C. Cir. 1987) (en banc). To style *Merwin* as a collateral proceeding, however, is to ignore the essence of a declaratory order. In *Bountiful,* the applicants sought the determination of a legal issue that would affect their pending licensure applications. In *Merwin* they sought, for the first time, the application of that legal determination to the very factual circumstance anticipated in the declaratory order.

The legislative history makes it crystal clear that administrative declaratory orders were intended to be the administrative equivalent of judicial declaratory judgments and were likewise intended to bind the parties:

> The administrative issuance of declaratory orders would be governed by the same basic principles that govern declaratory judgments in the courts.[10] Such orders, if issued, would not bind those not parties to them or determine subject matter not presented.

Administrative Procedure Act, Report of the Committee on the Judiciary, H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 233, at 263.

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[10] The federal Declaratory Judgment Act provides that a declaratory judgment shall have the force and effect of a final judgment or decree. The very purpose of this remedy is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata. Denial of any preclusive effect, indeed, would leave a procedure difficult to distinguish from the mere advisory opinions prohibited by Article III.

18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4446 at 397-98 (1981) (footnotes omitted). Here, the *en banc* majority of the District of Columbia Circuit treated the decision of the Eleventh Circuit reviewing *Bountiful* as if it had been advisory.

The *en banc* majority ignores the fact that their holding effectively nullifies the statutorily declared purpose of administrative declaratory orders. The *en banc* dissent recognizes the prospect that such orders may be transformed into "mere dress rehearsals whose result as to the parties is subject to complete reversal in a subsequent adjudication." *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission,* 826 F.2d 1074, 1099-1100 (D.C. Cir. 1987) (dissent).

CONCLUSION

The *en banc* majority not only has shattered preclusion doctrine but also has ignored the command of Congress by making it possible for an administrative agency to issue a declaratory order that terminates no controversy and removes no uncertainty. This *en banc* decision by the most influential court of appeals in administrative matters should not be allowed to destroy fundamental aspects of law. Therefore, the American Public Power Association respectfully urges that the Court grant the petition for a writ of *certiorari.*

Respectfully submitted,

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